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No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1947

FONG HAW TAN, PETITIONER

v.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals and the concurring opinion (R. 24–29) are reported at 162 F. 2d 663.

JURISDICTION

The judgment of the circuit court of appeals was entered June 25, 1947 (R. 30). The petition for a writ of certiorari was filed September 24, 1947. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien who receives a sentence of life imprisonment under an indictment in two counts charging him with the commission of two murders, the jury having returned a separate verdict of guilty on each count and fixed the punishment in each verdict at life imprisonment, is "sentenced more than once" to imprisonment for one year or more because of conviction of a crime involving moral turpitude, within the meaning of Section 19 (a) of the Immigration Act of 1917, whereby such an alien is subject to deportation.

STATUTE INVOLVED

Section 19 (a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155 (a)), provides in pertinent part:

> SEC. 19 (a) * * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General,

be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * *.

STATEMENT

On May 10, 1946, petitioner, an alien resident of the United States, filed in the District Court of the United States for the Northern District of California a petition for a writ of habeas corpus (R. 2–6) alleging that he was admitted into the United States for permanent residence in August 1910 and had thereafter continuously resided in this country; that he was being detained in respondent's custody under an order of deportation issued by the Attorney General in November 1941 charging that he was subject to deportation under Section 19 (a) of the Immigration Act of 1917, *supra,* in that he had been, after May 1, 1917, sentenced more than once to a term of imprisonment of one year or more because of conviction in this country of a crime involving moral turpitude, to

wit, murder; that the only time he had ever been sentenced to imprisonment because of conviction in this country of a crime involving moral turpitude was on July 21, 1925, when he was sentenced in Fresno, California, to imprisonment in the State penitentiary for the crime of murder alleged to have been committed on May 22, 1925, from which term of imprisonment he was later paroled; and that consequently the Attorney General had no power under the Immigration Act to order him deported.

An order to show cause was issued (R. 6–7) and a return made (R. 7–8). Respondent attached to his return, as Exhibit A, a copy of the warrant of deportation and the entire proceedings pertaining thereto. It appears from respondent's Exhibit A[1] that on June 11, 1925, an indictment in two counts was filed in the Superior Court of Fresno County, California, charging that on or about May 22, 1925, in Fresno County, petitioner murdered one Lai Quan (count 1) and that on or about the same date, also in Fresno County, petitioner murdered one Ong Kim (count 2). Following a trial by jury, petitioner was found guilty on both counts. The jury's verdicts read:

> We, the Jury * * * find the defendant Ong Ton[2] guilty of murder of the First Degree, as charged in the First Count of

[1] This exhibit is not contained in the printed record, but is filed as an original exhibit with the Clerk of this Court.

[2] It appears from Exhibit A that "Ong Ton" was an alias of petitioner.

> the Indictment, and fix the punishment at life imprisonment * * *.[2]
>
> We, the Jury * * * find the defendant, Ong Ton Guilty of Murder in the First Degree, as charged in the Second Count of the Indictment, and fix his punishment at life imprisonment * * *.

The judgment and sentence of the court read:

> That whereas, The said Ong Ton having been convicted of the crime of Murder of the First Degree on two separate counts
>
> It is Therefore Ordered, Adjudged and Decreed, That the said Ong Ton be punished by imprisonment in the State Prison of the State of California at San Quentin for a period of his natural life, or until legally discharged.

On August 12, 1946, the district court denied the petition for habeas corpus "Upon the authority of Nishimoto v. Nagle, 44 Fed. 2d 304, Cir. 9" (R. 8). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (R. 30), one judge stating in a concurring opinion that he had "serious doubts whether Congress intended the deportation statute to apply to a case like this," and that he concurred in the affirmance "only for the reason that this court, in Nishimoto v. Nagle, 44 F. 2d 304, has already decided the point, and

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[2] Section 190 of the California Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *."

should, until higher authority has spoken, follow that decision" (R. 29).

ARGUMENT

Petitioner was convicted of two murders. There is no showing that both murders grew out of the same incident. The California Penal Code provides that upon a conviction of murder the sentence shall be one of death or life imprisonment at the discretion of the jury. The jury fixed life imprisonment as the punishment for each murder. A life sentence was accordingly imposed by the trial court on the verdicts of the jury. We submit that petitioner was sentenced for each murder and therefore was "sentenced more than once," as provided in Section 19 (a) of the Immigration Act of 1917, as amended.

It cannot be denied that the following decisions in the circuit courts of appeals decide nothing which is in conflict with the decision below, and hence do not require discussion: *Johnson* v. *United States,* 28 F. 2d 810 (C. C. A. 2); *Nishimoto* v. *Nagle,* 44 F. 2d 304 (C. C. A. 9); *Tassari* v. *Schmucker,* 53 F. 2d 570 (C. C. A. 4); *Clark* v. *Orabona,* 59 F. 2d 187 (C. C. A. 1), certiorari denied, 287 U. S. 629. The only decisions which require analysis are those of the Second Circuit in *United States* v. *Day,* 51 F. 2d 1019, and the Fifth Circuit in *Wallis* v. *Tecchio,* 65 F. 2d 250. These decisions, it is true, are in conflict with decisions in other circuits, but

the reasoning which underlay them, and which engendered conflict, can have no application in a case such as the instant one.

In the *Day* case, involving concurrent sentences for counterfeiting violations, the Second Circuit distinguished its prior decision in the *Johnson* case, involving consecutive sentences for several arsons prosecuted in a single information, and held that it could not agree with the decision of the Ninth Circuit in the *Nishimoto* case, which also dealt with concurrent sentences in bad check cases.[4] It reasoned that there was not more than one sentencing because the trial judge by his concurrent sentences, although in a sense imposing a separate sentence on each count, elected, in essence, to treat the crimes as but really one offense.[5] In the instant case, obviously, the trial judge could not impose cumulative sentences because, as the court below said (R. 26), "In the nature of things [a life] sentence cannot be served twice."

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[4] The court referred to a contrary district court holding in *Opolich* v. *Fluckey*, 47 F. 2d 950 (N. D. Ga.).

[5] The Second Circuit decided two later cases *per curiam* on the authority of the *Day* case (*United States ex rel. Turco* v. *Commissioner*, 58 F. 2d 1087; *United States ex rel. Guerricia* v. *Reimer*, 79 F. 2d 1019). The facts are not recited in the decisions but, as appears from the petition for a writ of certiorari, they did not involve murder convictions (Pet. 9, 11–12). In the *Guerricia* case the court stated that the majority of the court as then constituted did not agree with the rule announced in the *Day* case, but nevertheless reversed the order involved "on that authority."

In the *Wallis* case, which involved consecutive and concurrent sentences rendered at the same time for counterfeiting violations, the Fifth Circuit attempted what it called an "independent construction." It said (p. 252):

> It is no fair rendering of the words [of the statute] to say that a sentencing at the same time for two crimes suffices, or that to receive two terms of imprisonment imposed by the same sentence is to be sentenced more than once. One must have burdened the country's courts with his prosecution, and have been publicly branded as a criminal by his sentence on at least two occasions. It may be within the choice of the prosecutor to so mould the proceedings as to make two separate prosecutions out of a situation, or to consolidate them into one; but should the former course be oppressively followed, the judge may defeat it by the power given him in the statute to veto deportation. On the record before us we think Tecchio has been sentenced but once, although he was then given several terms of imprisonment.

But such reasoning, whether good or bad in the case in which it was applied, has no application in a case such as the present one. The State in this case could only obtain one life sentence, no matter how many murders were committed or prosecutions instituted. For this reason there was only one prosecution and one general sentence to life imprisonment. Deportation could never

be accomplished in the face of two airtight capital cases unless the prosecutor went through the unusual procedure of separately prosecuting each.

The deportation provision in question was designed to rid the country of those aliens who had been sentenced for two serious, distinct breaches of our criminal laws. The conflicting views in the cases cited above do not relate to a twice-convicted murderer who, moreover, has not been shown to have committed the murders as part of a single incident. Those cases are concerned with situations where the effort to apply the Congressional purpose to lesser crimes has become entangled with forms of sentencing, multiplication of offenses, election to prosecute several offenses at one time or in separate proceedings, and analogous impedimenta.

CONCLUSION

For the reasons indicated, we respectfully submit that the petition for a writ of certiorari should be denied.

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